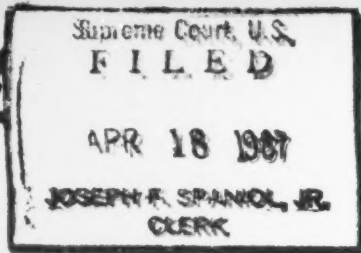


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No.

In The
Supreme Court Of The United States
October Term, 1986

KENNETH S. HOWER, Individually and as an officer of
Sunflower Seventeen, Inc. and SUNFLOWER SEVENTEEN,
INC., a corporation,

Petitioners,

-vs-

PICINICH & RIGOLOSI, P.A., and RONALD J. PICINICH,
Individually,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI

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10/2/86

QUESTION PRESENTED

1. Is a directed verdict against a plaintiff in a legal malpractice action a violation of the Fourteenth Amendment of the Constitution of the United States when the plaintiff has failed to introduce evidence that the defendant attorney has deviated from the accepted standards of the legal profession?

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Respondents, Picinich & Rigolosi, P.A. and Ronald J.
Picinich, Individually, respectfully pray that the Petition for
a Writ of Certiorari be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. New Jersey Court Rule 1:12 provides, in relevant part that:

“The judge of any court shall disqualify himself on his own motion and shall not sit in any matter, if he...(d) has given his opinion upon a matter in question in the action; or (e) is interested in the outcome of the action; or (f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.”

2. New Jersey Court Rule 4:37-2(b) At Trial-Generally. After the plaintiff has completed the presentation of his evidence on all matters other than the matter of damages (if that is an issue), he shall so announce to the Court and thereupon the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or any claim against him on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such a motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

REASONS FOR DENYING THE WRIT

There is no basis for issuance of a writ of certiorari as Petitioner has made no showing of a violation of due process: notice and the opportunity to be heard.

Petitioner alleges that he has been deprived of Constitutionally protected rights under the due process clause of the Fourteenth Amendment to the United States Constitution. It is the Petitioner's burden to establish such a violation, and that burden has not been met. Petitioner has failed to demonstrate how this case presents an important Federal question which requires decision by the United States Supreme Court or how it presents any conflict between the two decisions of courts of the last resort of the states.

Petitioner was given the opportunity to present his case to a judge sitting with a jury and did so. He thus was provided notice and the opportunity to be heard. The matter was dismissed by the trial court since Petitioner failed to meet his burden under the substantive law of the State of New Jersey in malpractice actions. That is, plaintiff failed in his burden as there was no evidence about which reasonable minds could differ proving that the defendants were professionally negligent and, even if so, that any negligence was a proximate cause of damages sustained by Petitioner. Even if one pursues all legitimate inferences from evidence presented by plaintiff at the trial, there was a failure to present substantive evidence of a deviation from accepted standards of the legal profession as required by New Jersey substantive law. *Dolson v. Anastasia*, 55 N.J. 2 (1969). There are requirements in legal malpractice actions that a party suing for a deviation from accepted standards of the legal profession present evidence as to the existence of the standard and that the defendant's conduct deviated from such a standard. *Hoppe v. Ranzini*, 158 N.J. Super. 158 (App. Div. 1978), *Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325 (1980), *Passanante v. Yormark*, 138 N.J. Super. 233 (App. Div. 1975), *Stewart v. Sbarro*, 142 N.J. Super. 581 (App. Div. 1976).

In support of this petition, Petitioner argues facts that were presented at the trial a level in detail and which have been brief-

ed before the Appellate Division of the New Jersey Superior Court as well as the New Jersey Supreme Court. Simply stated, Petitioner must establish that there was evidence in the record concerning the standard by which the defendant was to be measured and that there was no reasonable basis for the trial level to have concluded that the plaintiff has failed to meet his burden.

Petitioner bypasses the shortcomings of the presentation of the trial on its merits and jumps to an attack on the impartiality of the judiciary.

There is simply no basis to conclude that a New Jersey Appellate Court judge has an interest in the outcome of a legal malpractice case simply because that very same judge participated in a earlier decision of the underlying case giving rise to the legal malpractice action.

Petitioner's position that Appellate Division Judge Warren Brody "was under a duty to disqualify himself" because he was a panel member on the Appeal of the underlying case defies logic, let alone gives rise to a Constitutional deprivation. There simply is no basis to an argument that the Court or a particular judge was prejudiced against the interests of any party as required to establish a basis for disqualification under New Jersey Court Rule 1:12-1. Petitioner's reliance on the aforementioned Rule is misplaced. One can make loose allegations, but there are no facts about this Court or facts presented before any court which has heard this matter which would substantiate a claim that Judge Warren Brody had an interest in the outcome of this case.

The attacks upon the judiciary of the State of New Jersey as being appointed by the Governor, and thus making such judges political in nature, do not deserve rebuttal. There is no affidavit or factual support for any such attack upon the impartiality of the court, and there is no need to respond to same.

Petitioner's argument that the defendant attorney, Respondent in this petition, acted in a conflict of interest based upon

ownership must be examined in light of the record Petitioner had every opportunity to present evidence concerning such a conflict and how any such perceived conflict influenced handling of the Petitioner's case. Petitioner failed to demonstrate any connection between the alleged "conflict" and the defendant's handling of the case. The trial court issued a reasoned and thorough opinion and commented upon the conflict of the attorney and lack of causation between such conflict and the Petitioner's fate.

CONCLUSION

It is respectfully submitted that no statement of special reasons has been made to explain how this case presents a question of general public importance and how the Petitioner has incurred or suffered a Constitutional deprivation. Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

**Respectfully submitted,
RICHARD A. AMDUR, P.C.**

Attorney for Respondents

